NO LK & W. RY. CO. *v.* DEAN'S ADM'X.

Nov. 21, 1907.

[59 S. E. 389.]

1. Railroads—Injuries to Persons on Track—Discovery of Danger.—Where a railroad company knows of the dangerous position of a person on its track, and that such person is unconscious of his peril and will take no measures for his own protection, it is its duty to do all that can be done, consistent with its higher duties to others, to avoid running such person down, regardless of his own negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1275.]

2. Same—Question for Jury.—Where, under the evidence, reasonable men may differ as to whether a railroad did all that was required of it to avoid running a person down after discovery of his peril, the case is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1375.]

3. Same—Right to Presume That Persons on Track Will Leave.—A railroad company has the right to assume that a grown person, in the apparent possession of all his faculties, seen on its track will get out of the way of an approaching train, and is not liable unless, after the company in the exercise of ordinary care could have discovered that he was not going to get off the track, it could have avoided running him down.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1280.]

4. Same—Sufficiency of Evidence.—Evidence in an action for the death of plaintiff's intestate on the track held to show that the railroad did all that was required of it to avoid running him down after discovery of his peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1359.]

Error from Circuit Court, Tazewell County.

Action by one Dean's administratrix against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Henry & Graha and *S. D. May,* for plaintiff in error.

Wm. H. Werth and *Chapman & Gillespie,* for defendant in error.

KEITH, P. Dean's administratrix sued in the circuit court of Tazewell county to recover damages for the wrongful death of her intestate, and filed a declaration containing two counts, to which the defendant company demurred, and the court sustained

the demurrer to the first, but overruled it to the second count. Thereupon the plaintiff filed another count, which was demurred to, and the demurrer overruled. A trial was then had, which resulted in a verdict of the jury, subject to the defendant's demurrer to the evidence. Upon that verdict the court rendered judgment in favor of the plaintiff, and the case is before us upon a writ of error awarded by one of the judges of this court.

The circuit court filed a written opinion in support of its judgment, in which it says that the first count in effect charges that the place on defendant's track where plaintiff's intestate was killed was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect plaintiff's intestate was killed.

"The second count," continues the court, "avers, in effect, that after the crew in charge of the defendant company's train had discovered intestate was on the track in front of said engine, and that he was unconscious of his danger and would take no measure to protect himself from the danger, the said crew in charge of said engine failed to use any measure whatever to prevent injuring plaintiff."

The circuit court was of opinion that there could be no recovery upon the first count, because of the contributory negligence of the person injured, but rests the case solely upon the second count in the declaration, in which the case presented is that, after it became apparent to the crew in charge of defendant company's train that intestate of plaintiff was on the track in front of the engine, that he was unconscious of his danger, and would take no measures to protect himself, the crew failed to use any measure to prevent the accident. Such being the issue to be determined, it is needless to consider so much of the evidence as relates to the use of the track as a public passway, or as to whether or not the person injured was a licensee or a trespasser He was a human being, and when his dangerous position was seen and known, and that he himself was unconscious of his peril and would take no measures for his own protection, it became the duty of the railroad company to do all that could be done consistent with its higher duties to others to save him from the consequences of his own act, regardless of whether he was guilty of contributory negligence or not. Seaboard & Roanoke R. Co. *v.* Joyner's Adm'r, 92 Va. 355, 23 S. E. 773.

This being the narrow issue to be decided, it becomes necessary to consider the evidence bearing upon it with care, and if, as a result of that inquiry, it shall appear that there is room for a difference of opinion among reasonable men, then, in accordance

with the decision of the Supreme Court of the United States in Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed 485, and with Kimball & Fink, Rec'rs, *v.* Friend's Adm'r, 95 Va. 125, 27 S. E. 901, which have been so frequently followed in this court, the case is one proper for a jury, and the demurrer to evidence should have been overruled.

At the point of the accident the railway is double-tracked; one track being used by trains moving toward the west, and the other by trains moving toward the east. It was the habit of pedestrians who used these tracks for a passway to walk upon them in a direction opposite to that in which trains were accustomed to move, so that the train using the track would be in front of the person upon the track and moving toward him. A man walking west, therefore, would be upon the track used by east-bound trains, while a man going toward the east would be upon the track used by trains going in the opposite direction. But, while this was the customary and usual way of moving the trains upon the tracks, it not unfrequently happened that a train going west would be upon the east-bound track, or a train going east upon the west-bound track. In other words, the tracks were used at this point as was most convenient in the shifting and movement of trains, in order to perform the various duties of the railroad company. Upon the morning of the accident there was a freight train, consisting of 55 or 60 cars, drawn by two engines, moving west upon the west-bound track; and there was a light engine and tender, moving tender in front, and also going west, upon the east-bound track. As they approached a bridge over Bluestone river, Dean, the man who was killed, was seen walking upon the east-bound track in front of the tender and near the west end of the bridge.

The first witness examined by defendant in error was A. W. Tabor. He did not see the accident, and his evidence bears only upon the locality, which we have endeavored to describe, its use by people, and the result of certain experiments which he tried, tending to show how far down the track a man sitting upon the bumper of the tender of the engine that caused the accident could have seen a man standing on the track; but his evidence is not very material, because, as has been already said, there is no doubt that the trainmen saw the deceased, and it may be conceded that they saw him at such a distance as that the engine might have been stopped without doing him any injury, if it further appears that he was then in apparent danger and was not likely to take any measures for his own protection.

The first witness for defendant in error who saw the accident was Whitworth. He says that on the day in question he was in charge of a coal train that works at Pocahontas at night; that he came to the Flat Top yards and got instructions to take his train to Mullin's Siding, which is about a mile toward the east from

Falls Mills, the station near which the accident occurred. Having put his train at Mullin's Siding, as directed, he was returning, in accordance with his orders, to Flat Top yards, and was sitting on the back end of the tank when he noticed a man walking down the track. The engine was moving, it will be remembered, tender in front. The witness, continuing, says: "When I first saw the man I wasn't thinking about his being run over, and I didn't pay much attention to him until I got closer, and then I hollered, and signaled to the engineer to stop; but it didn't do any good, as he didn't pay any attention to it at all, and we ran over him and killed him." Dean was within two or three steps of being off the bridge when first seen by this witness at a distance of about three telegraph poles, or in the neighborhood of 180 feet. Witness says that he cannot say exactly how far the engine moved while he was watching the man; that he was expecting him to step off the track; that it was a matter of daily occurrence that people walked on the railroad track until the engine was in 8 or 10 feet of them, when they would step off; and that "if we stopped the train every time we see a man on the track it would take us from now until next Christmas to get to Bluefield"; but that probably it was half the distance between two and three telegraph poles "before I made any alarm, or something like that; I couldn't say exactly." The first signal which he gave to the engineer, when he found that there was danger of injury to Dean, was that the witness denominates as the "steady" signal. "I didn't waive him down, I just held my hand out." He was then examined rigidly as to what the result of the signal was—as to whether or not the engineer put on the emergency brake; but in reply to this line of examination the witness said that he could not tell whether the emergency brake was put on or not, but that the brake was applied after he had given the signal. It appears, further, from his testimony, that what is known as the "service brake" differs from the emergency brake only in degree. If the full force of air is turned upon the brake, that is an "emergency brake." In ordinary cases less than the full force is turned on, and that is the service brake. In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied.

The sum of this witness' testimony is this: That he first discovered Dean upon the track at a distance of about three telegraph poles, or 180 feet; that at the moment of his discovery he did not consider him in danger, that it is a very usual thing for people to walk on the railroad track, and by stepping to the right or left they reach a place of safety, and that oftentimes this is not done until the train has approached within a few feet;

that he had passed over about half the distance which had intervened between him and the man when he first saw him—that is to say, 90 or 100 feet—when he gave the engineer the signal to "steady"; that he could not say exactly at what point this signal was given; and that after he had passed over about half the remaining distance, it then appearing to him that the man was in danger, the engineer was given the second signal to stop his engine. It appears that during this time the bell was being rung by the fireman in the cab.

The next eye witness to the accident examined testified on behalf of plaintiff in error and their testimony is not to be considered upon a demurrer to evidence, if it be in conflict with that of the witnesses for defendant in error.

R. B. Ferguson was the engineer in charge of the engine which did the injury. After leaving his train at Mullin's Siding he says: "I was on the east-bound track going west, and there was a train going west on the west-bound track when we struck Dean. We came around a little curve, and the fireman sitting up in the window and ringing the bell. He hollered to me to look out, or hold her, or something to that effect. I slammed the brake in the emergency, and reversed my engine, and we ran down about a couple of engine lengths, and he said we ran over a man, and I think we ran about two engine lengths after he hollered at me before I came to a dead stop, and there was a man laying in the middle of the track." The engineer did not see the man before he was killed. He was running at the rate of about 15 or 18 miles an hour. He is positive that he put on the emergency brake and reversed his engine at once. Again he says: "I gave her the whole braking power she had. She slid about two engine lengths—I couldn't tell you how far—and the wheels locked."

W. D. Tabor was the fireman on this engine. He says: "I saw some one walking in front of the engine on the track, and I called Mr. Ferguson's attention to it. Just as soon as I did, he threw the air in the emergency and stopped as quick as he could. We had done run over the man, though before he stopped." When witness first saw the man he was about 60 feet away, and just getting off the bridge on the west end. This witness also states that he was at the time ringing the bell, and had been ringing it for nearly three-quarters of a mile; that the whistle was blown at the crossing above Falls Mills, and was also sounded by the engineer after the fireman called his attention to the man upon the track. Being asked whether there was anything else that could have been done to stop the engine and save the man, he replied:

"No, sir. Q. What was the man doing when you saw him? A. He was walking along the middle of the track, and paid no attention, and didn't seem to know we were coming.

Defendant in error relies in great measure upon the statement of the witnesses that Dean did not seem to be paying any attention. It must be remembered that his back was to the witnesses. They could not see his countenance, and their opinion would, therefore, seem to be of little value. The positive evidence, by the solo eye witness of the accident who testified on behalf of the defendant in error, is that he had his eye upon the man; that when he first saw him he did not consider him in danger; that as soon as he felt any apprehension as to the situation he gave the engineer the signal to "steady," and immediately followed it with the signal to stop; that it was a matter of frequent occurrence to see men walking upon the track and remain upon it until the engine came close upon them.

Reliance is placed by defendant in error upon the fact that the freight train was passing at the time, and that the noise it occasioned prevented Dean from hearing the train approaching him from the rear; but that circumstance would be of value only in dealing with the question of contributory negligence, and not with the duty of the railroad company after it actually saw Dean on the track.

So, too, the custom of the company to run its west-bound trains upon the west-bound track, and its east-bound trains upon the other track, is of no value in the determination of the precise point in issue here; the sole question being whether or not, after Dean's peril was discovered, the agents of the railroad company did all that was required of them to same him from injury.

There is no conflict of evidence here. If the statement of Whitworth, the conductor, be taken alone, all was done that should have been done under the circumstances of the case. If the emergency brake had been applied at the instant Whitworth discovered the presence of Dean upon the track, the accident would have been averted; but in the honest exercise of his discretion, in the light of his long experience, he did not at that moment consider Dean in a position of peril. He appears to have been an intelligent and capable official; and there is no reason to suppose that his conduct was not controlled by an honest purpose to do his duty, or that he did not give the signal to "steady" and then to stop to the engineer as soon as the danger of Dean's position became apparent to him.

If the testimony of Tabor, the fireman, and of Ferguson, the engineer, be looked to (and there seems to be no reason why

their testimony should not be considered, being in support and not contradictory of the statements of Whitworth, who testified on behalf of the defendant in error), then the case is all the stronger for the plaintiff in error, for they show very clearly that the accident was due to no failure of duty upon their part, but that with the light before them they did all that careful and reasonable men could have done to save Dean from the consequences of his own temerity.

The law upon the facts as here presented is well settled.

In N. & W. Ry. Co. *v.* Harman's Adm'r, 83 Va. 577, 8 S. E. 258, it is said that "if the person seen upon the track is an adult, and apparently in the possession of his or her facilities, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of willful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness."

The same doctrine is stated in Tyler, Receiver, *v.* Sites, 90 Va. 539, 19 S. E. 174.

In Rangeley's Adm'r *v.* Southern Ry. Co., 95 Va. 715, 30 S. E. 386, it is said that a railroad company has the right to assume that a grown person seen on its track will get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

And in Savage *v.* Southern Ry. Co., 103 Va. 422, 49 S. E. 484, it is said: "It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track, in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety. The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger; that is to say, when he saw, or ought to have seen, that Savage was himself unconscious of his peril and would take no measures for his own protection. This proposition has been decided in numerous cases by this court."

The only witnesses in this case bearing directly upon the point in issue show that the trainmen, in the exercise of their best discretion, measured up to the duty imposed upon them by the law.

We are of opinion, therefore, that the demurrer to evidence should have been sustained, and the judgment of the circuit court must be reversed.

Note.

There is a marked similarity between the facts in this case and in Stegall's case, 54 S. E. 19. In the Stegall case the plaintiff was walking on a trestle of defendant company, which the public was, with the defendant's consent, accustomed to use as a pathway. Defendant backed a train over the trestle, keeping no lookout, at a rate of speed forbidden by a city ordinance and killed plaintiff. President Keith did not take part in the decision of this case. The first count in the principal case in effect charged that the place on defendant's track, where plaintiff's intestate was killed, was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect, plaintiff's intestate was killed. This was exactly the state of facts in Stegall's case, but as the court below based its decision solely on the second count, charging that defendant company took no measures to prevent the accident after discovering the plaintiff's peril, it was unnecessary to pass upon this most interesting question as to whether there is any higher duty owed to licensees on the track than to trespassers. In short, are we to retain the harsh doctrine announced in Stegall's case that a railroad company does not owe even to licensees the duty of trying to discover them upon the tracks, thus placing licensees and trespassers upon the same footing; and this in the face of Plankenship *v.* Railroad Co., 94 Va. 449; Railroad Co. *v.* White, 84 Va. 498, stating the law to be that reasonable care is the duty which a railroad company owes, at the least, in all cases, to all persons; that what is reasonable care depends on the circumstances; that not keeping a lookout for possible trespassers upon its tracks is not such an onlission of reasonable care as will make a railroad company liable; but that the duty of using reasonable care to discover them is due to lieensees, who from the fact that their presence is acquiesced in by the railroad company, occupy toward such company a higher position than do mere trespassers, and are entitled to a greater protection by the law.

See learned note by Mr. Robert W. Withers, in 12 Va. Law Reg. 419.

COFFMAN *v.* LIGGET'S ADM'R *et al.*

Nov. 21, 1907.

[59 S. E. 392.]

1. Assignments—Rights of Subsequent Assignees.—A subsequent assignee of a thing in action for value and without notice of a prior assignment takes in equity a right superior to a prior assignment without transfer of the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignment, §§ 149, 150.]

2. Same—Essentials.—An assignor of a chose in action must part